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ABSTRACT

This publication consists of two articles commenting on the recent Supreme Court decisions regarding school desegregation cases in Columbus and Dayton, Ohio. In the first work, author William Taylor offers a legal analysis of the Columbus and Dayton decisions, their historical background, and their implications for the future of desegregation litigation. In the second article, Derrick Bell appraises the national political and economic environment in which the Columbus and Dayton decisions must be interpreted. (Author/GC)

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Legal Analysis

Trends in School Desegregation Law

No. 3
October 1979

A publication of the National Project and Task Force on Desegregation Strategies

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EDITOR'S NOTE:

For this issue, we have asked two respected legal authorities in the field of desegregation to comment on the Supreme Court's recent decisions in the Columbus and Dayton, Ohio school desegregation cases. In the first piece, Bill Taylor offers a traditional legal analysis of the Columbus and Dayton decisions, their historical background and their implications for the future of desegregation litigation. The second article, by Derrick Bell, is not a traditional legal analysis, but instead offers, in the author's words, "an appraisal of the national political and economic environment in which (the Columbus and Dayton decisions) must be read and implemented."

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COLUMBUS AND DAYTON: A RENEWED COMMITMENT TO EQUALITY

By: William Taylor, Director, Center for National Policy Review, Catholic University Law School, Washington, D.C.

Even Cassandra occasionally nods. On the equal education front, the major news of 1979 is that contrary to widespread expectations, the Supreme Court did not abandon or relax legal principles requiring the desegregation of Northern school districts. Instead, in two major decisions issued on July 2, 1979[1], the Court gave ringing reaffirmation to its 1973 judgment in the Keyes case[2], an opinion establishing standards which led to a comprehensive desegregation plan for Denver, Colorado and to numerous lawsuits seeking similar relief in other districts. The two decisions, involving the school systems of Columbus and Dayton, Ohio make clear that the Court has not strayed from the course established in Keyes and that education officials in many states must still come to grips with conditions of pervasive racial segregation that exist in the public schools of their districts.

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Background

Although we recently marked the twenty-fifth anniversary of the Supreme Court's decision in Brown v. Board of Education[3] repudiating the doctrine of "separate but equal" in public education, the development of law specifically applicable to the North is of far more recent origin. Faced with massive resistance to the Brown decree in large parts of the South, it was not until 1973 that the Court was ready to take on questions concerning segregation in the 33

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Northern and Western states which did not have segregation statutes at the time of Brown.

When it finally did reach the issue, the Court did not equivocate. On the critical question of what is needed to establish a violation of the Constitution, the Court in Keyes made it clear that segregative actions could contravene the equal protection guarantees of the Fourteenth Amendment even if they were not embodied in a statute or other official declaration of policy. The Court did require a showing of "a current condition of segregation resulting from intentional state action"[4], indicating that school segregation resulting solely from housing patterns or other conditions for which government bore no responsibility would not violate the Constitution. But the requirement of proving intent was not made an insuperable barrier; the thrust of the decision was that, rather than being required to prove the subjective motivation of school officials, lawyers for minority children could establish intent by objective means, e.g., by showing a series of school board decisions that resulted in segregation and that could not persuasively be explained away on non-racial grounds.

On the equally vital issue of remedy, the Supreme Court articulated standards in Keyes that promised thoroughgoing desegregation plans in districts found to have violated the Constitution. The question was what type of remedy would be appropriate in situations where plaintiffs had established that some segregated schools in a district were the product of deliberate racial acts but the record was not clear as to the causes of segregation in other schools. The Court ruled that if plaintiffs proved intentionally segregative actions "in a meaningful portion of a school system", other segregated schools would be deemed to be the result of similar racial action unless the school district could prove otherwise. Since the burden of disproving racial intent is a difficult one, in the ordinary case once plaintiffs have shown de jure segregation for a substantial part of the district, a comprehensive systemwide desegregation plan would be required.

Despite the forceful and decisive tone of the Keyes opinion, issued with only two dissenting votes, doubts soon arose about the future of school desegregation in the North. In 1974, the Supreme Court, in a narrow 5-4 decision, ruled against a metropolitan desegregation plan involving Detroit and its suburbs.[5] While the legal question of inter-district relief was different from the Keyes issue (which concerned remedy within a single district) and while the Court did not rule out metropolitan relief in future cases, the Detroit case was the first major legal setback to proponents of desegregation in the Brown era. Moreover, some people, assuming in the wake of Detroit that metropolitan relief would be virtually impossible to secure, questioned the value of within-district remedies in the many large urban areas where central city school districts had become disproportionately minority in their enrollment and suburbs remained virtually all-white.

Three years later, the Supreme Court decided another Northern school case in a way which fueled more speculation about the future course of desegregation. Dayton I came to the Court in a peculiar posture. A district court ordered a comprehensive desegregation plan involving the busing of about 15,000 children when pressed to do so by the Court of Appeals. But the district judge, hostile to the claims of plaintiffs, made only the most limited findings of acts of intentional segregation. The Court of Appeals noted that there was far more evidence of deliberate discrimination in the record than the trial

court had found, but since the appellate judges viewed the result as correct, they simply approved it without making findings of their own.

A unanimous Supreme Court said that the Court of Appeals had been too careless. Since only isolated instances of deliberately segregative acts had been found (not affecting a meaningful portion of the school district), the Court decided to send the case back to the lower courts for further proceedings to deal with "the disparity between the evidence of constitutional violations and the sweeping remedy finally decreed."[6] On its face, Dayton I was not in conflict with Keyes. But the decision appeared to reinforce an increasing insistence by the Court, expressed in a 1976 decision on employment[7] and a 1977 decision on housing[8] that relief under the Fourteenth Amendment be predicated only on strong evidence of racial motivation. Moreover, language inserted into the Dayton opinion by Mr. Justice Rehnquist appeared to introduce further complications into the quest for comprehensive desegregation plans. If the District court did make new findings of violations, he said, it must then

> determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that condition is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.[9]

Justice Rehnquist's language was a puzzle. How could anyone say with certainty what the condition of segregation in a community "would have been in the absence of ...constitutional violation"? In practical terms, the outcome of a particular case appeared to rest on who had the burden of proof. If plaintiffs had to prove that no segregation would have existed in a community in the absence of a constitutional violation, they would be likely to fail. But if Keyes was still good law, once plaintiffs showed deliberate segregation in "a meaningful portion" of the district, it would be the burden of school officials to disprove the need for thorough desegregation. While the Dayton opinion did not say that Keyes was no longer good law on this point and while the language about "incremental segregative effect" was mere dicta (not necessary to the decision in the case), many people assumed that in the future any desegregation remedies would be very limited in scope.

Most federal courts, however, read Dayton in literal terms and continued to apply Keyes in finding constitutional violations and ordering systemwide remedies. In Dayton itself, the Court of Appeals for the Sixth Circuit in the summer of 1978 reversed the district court's decision to dismiss the case. This time, however, the appeals court accompanied its decision with detailed findings of deliberately segregative acts by Dayton school officials. In a separate case, the court also upheld lower court findings of extensive violations and a need for systemwide remedy in Columbus, Ohio.

When the Supreme Court in the fall of 1978 exercised its discretion to accept both the Dayton and Columbus cases for review, most observers concluded that the handwriting was on the wall for school desegregation in the North.

Dayton Revisited

The pundits were wrong. On July 2, by a 5-4 vote, the Supreme Court sustained the Court of Appeals in its rulings that there were substantial violations of the Constitution in the Dayton school system and that the previously mandated systemwide desegregation plan, involving the transportation of 15,000 students, was an appropriate remedy.[10] By a wider 7-2 margin, the Court upheld the broad relief ordered by the lower courts in Columbus.[11]

In its opinions, the Court swept away doubts created by the decision in Dayton I, reaffirmed Keyes and clarified the duties of Northern school officials.

In probing the issue of violation, the Court's opinion,written by Mr. Justice White, adopted the mode of analysis used by the Court of Appeals which involved first, a determination of whether at the time of the Brown decision in 1954 school officials in Columbus and Dayton were operating a racially dual system and second, an examination of what the two systems had done since 1954 either to cure or aggravate previously existing segregation.

The pre-1954 histories of Columbus and Dayton were similar. Neither system had officially declared policies of racial segregation. But as black people migrated to both communities in the first half of the 20th century, several devices, including the selection of sites for schools, the manipulation of attendance boundaries and rigid segregation in the assignment of faculty, were used to confine most black children to segregated schools. While all of the segregation that existed was not accounted for by proof of specific discriminatory practices, the school boards had not produced persuasive evidence that some of it was innocently caused. Thus, the Supreme Court concluded that the Court of Appeals was correct in finding that in 1954 both districts had committed systemwide violations and were operating dual systems.[12]

After 1954, the paths taken by the two districts diverged somewhat. While Dayton did not take affirmative action to desegregate its schools, the evidence was not extensive that school officials had deliberately perpetuated or compounded the situation. In 1951, the board adopted a policy of "dynamic gradualism" under which "black teachers were assigned to white or mixed schools when the surrounding communities were ready to accept black teachers, and white teachers who agreed were assigned to black schools." As a result, faculties stayed largely segregated until the 1970s. Other post-1954 acts included the conversion of a black high school into a black elementary school and its replacement with a new black high school, and the use of optional attendance zones to facilitate the flight of whites from areas that were becoming integrated. Dayton claimed, however, that these at most were isolated acts and that it should not be charged with correcting wrongs that took place more than a quarter of a century ago.

In contrast, in Columbus, the lower courts found that after 1954 the board engaged in a series of intentional actions that actually aggravated segregation instead of alleviating it. These acts included assigning black teachers only to black schools, segregative use of optional zones, gerrymandering and other forms of boundary manipulation to maintain segregation and the selection of sites for new schools in the heart of residentially segregated areas. On the other hand, through annexations and population increases, the Columbus School district, unlike Dayton, had grown enormously in size since 1954. Some of the schools

that were all-white by design in 1954 had become all-black in enrollment by the 1970s. Some all-white schools were in areas annexed after 1954 and the school district argued that the segregated character of these schools was not proved to be the result of deliberate actions taken either before or after 1954.

None of the school boards' arguments impressed the Court. To Dayton's contention that it had done little wrong after 1954, the Court responded that given the dual system that existed in 1954, the Board was under a continuing, affirmative duty to eradicate the effects of its past practices. While noting that Dayton school officials had actually compounded segregation after 1954, the Court pointed out that in any event "the Board had to do more than abandon its prior discriminatory purpose" and that the ultimate measure of its post-1954 conduct was "the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system."[13] To the Columbus argument that segregation would exist anyway, since many of the areas where all-white schools existed before 1954 were now all-black, the Court replied that this phenomenon seemed only to confirm evidence that "school segregation is a contributing cause of housing segregation,"[14] an observation that had also been made in the Keyes and Swann cases.[15]

In dealing with this latter point, the court also defused Mr. Justice Rehnquist's "incremental segregative effect" language which in Dayton I had appeared to pose such a threat to systemwide desegregation plans. Replying to one effort to minimize the impact of segregative actions, the Court added a nuance to the meaning of "incremental" by stating that the contention ignored "the incremental impact of systemwide practices extending over many years".[16] The statement echoed language in Keyes that even acts which occurred long ago "may have been a factor in creating a natural environment for the growth of further segregation".[17] Whatever may be left of "incremental effects" as an abstract concept, Justice White's opinion made it clear that once plaintiffs make their case, the burden is on school officials to disprove the need for a comprehensive, systemwide remedy, something they will ordinarily find difficult to do.

Why did two Justices - Stewart and Burger - vote to uphold the desegregation order in Columbus but not in Dayton? In Justice Stewart's separate opinion, he stressed two factors, a desire to give a great deal of deference to the findings of the district courts which heard the evidence in the two cases and reached different results, and a belief that pre-1954 acts are of limited validity in explaining contemporary segregation "(m)inds have changed... generations have changed...) and that only in Columbus was there evidence of fresh discriminatory acts.

Despite the narrowness of the margin in Dayton, the two decisions did not hedge on the important issues. The thrust of the rulings is clear. Those who seek to challenge school segregation in the North must demonstrate that the confinement of minorities to particular schools and areas did not arise fortuitously but rather through deliberate racial acts in which school officials played a significant role. However, once plaintiffs have made their case by documenting the origins of segregation, the remedy ordinarily will be a district-wide desegregation plan.

The Current Agenda

The Dayton and Columbus decisions left open but unresolved the legal prospects for inter-district or metropolitan school remedies which many regard as the key

to achieving stable desegregation in major urban areas. Since 1974, when the Supreme Court rejected inter-district relief for Detroit, two urban areas - Louisville, Kentucky and Wilmington, Delaware - have undertaken metropolitan desegregation plans. In Wilmington school districts were consolidated and students reassigned in September, 1978 after the Supreme Court had once approved and twice declined to review lower court desegregation directives. A fourth appeal is pending. The next case to reach the Court may well come from Indianapolis, Indiana where in July, 1979, a federal district court, having found an inter-district violation, ordered the reassignment of about 6,500 black students from Indianapolis to suburban school districts. The case is now on appeal in the Seventh Circuit, with suburban school jurisdictions objecting to any metropolitan relief and the Indianapolis board protesting the failure of the court to order a broader, two-way remedy. Indianapolis, however, may be regarded as a case of limited applicability since, like Wilmington, it involves the manipulation of boundaries by the state in ways that promoted or maintained segregation. A truer test of the prospects for metropolitan desegregation may be presented when the Court considers a case in which the primary contention is that minorities have been excluded from suburban school jurisdictions by racially discriminatory housing actions. That won't happen soon.

There are some signs that when the Supreme Court next considers an important case, it will do so in a less negative political climate than has prevailed in recent years. Three weeks after the Columbus and Dayton decisions, anti-desegregation forces in Congress suffered a major setback when the House of Representatives defeated a proposed constitutional amendment to ban all busing for desegregation. The amendment, sponsored by Rep. Ron Mottl (D. Ohio), had been brought to the floor by the rarely used procedure of a discharge petition requiring the signatures of 218 representatives. But when it came to a vote, many Congressmen had second thoughts about tampering with the Constitution and the amendment was defeated 216-209, failing to muster even a majority much less the 2/3 vote needed for adoption. Among the important ingredients in the result were a determined lobbying effort by the old civil rights coalition and the decision of a substantial number of Southern Congressmen to oppose the amendment on grounds that their communities had come through desegregation successfully and little was to be gained by reopening old racial conflicts.

There have been other positive developments. While concern about white flight in urban areas persists, community groups in Louisville, Kentucky and Charlotte, North Carolina and elsewhere have sought to use school desegregation decrees as a means of stabilizing or promoting residential desegregation, sometimes making a virtue of the decreased busing that can result from housing desegregation. While a few social scientists continue to debate whether "the glass is half-full or half-empty" in assessing the impact of desegregation on achievement, others have turned their attention to identifying the conditions that have produced successful desegregation.[18] And, in a few states, notably Wisconsin and Ohio, legislators have sought to assert state responsibility in ways that will aid the desegregation process.

No one has yet figured out a way to eliminate entrenched racial segregation from the schools without incurring some community conflict and trauma. But now that the Supreme Court has said unequivocally that the mandate for equal educational opportunity is not soon to be dissolved, more attention and resources may be given to efforts to assure that the process of change works to the benefit of all children.

FOOTNOTES

1. Columbus Board of Education v. Penick, __U.S.__, 47 L.W. 4924 (1979) and Dayton Board of Education v. Brinkman, __U.S.__, 47 L.W. 4944 (1979).

2. Keyes v. School District No. 1 of Denver, Colorado, 413 U.S. 189 (1972), remanded, 521 F.2d 465 (10th Cir. 1975), cert. denied, 423 U.S. 1066 (1975).

3. Brown v. Board of Education, 347 U.S. 483 (1954).

4. Keyes, 413 U.S. 189, 200 (1972).

5. Milliken v. Bradley, 433 U.S. 267 (1977).

6. Dayton, 433 U.S. 406, 419 (1977).

7. Washington v. Davis, 426 U.S. 229 (1976).

8. Arlington Heights v. Metropolitan Housing Development, 429 U.S. 252 (1977).

9. Dayton, 433 U.S. 406, 420 (1977).

10. Dayton, __U.S.__, 47 L.W. 4944 (1979).

11. Columbus, __U.S.__, 47 L.W. 4924 (1979).

12. The Court did not discuss in detail how racial purpose should be ascertained in the first place. Defendants had protested strenuously the 6th Circuit's use of a standard under which "a presumption of segregative purpose arises when plaintiffs establish that the natural, probable and foreseeable result of a public official's action or inaction was an increase or perpetuation of public school segregation." Justice White responded that the Court had never held that "foreseeability" alone was sufficient to make out a case of purposeful discrimination, but that it is "one type of quite relevant evidence of racially discriminatory purpose..." Dayton Op. pp.8-9 fn. 9.

13. Dayton, __U.S.__, 47 L.W. 4944, 4947 (1979).

14. Id. at 4928 n.13.

15. Keyes, 413 U.S. 189, 200 (1972) and Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20 (1971).

16. Columbus, __U.S.__, 47 L.W. 4924, 4928 n.13 (1979).

17. Keyes, 413 U.S. 189, 211 (1972).

18. See, Henderson and Von Euler, "What Research and Experience Teach Us About Desegregating Large Northern Cities," VII Clearinghouse for Civil Rights Research (CNPR, Spring 1979).

A GIFT OF TIME

BY: Derrick A. Bell, Jr., Visiting Professor, University of Washington Law School

In the beautiful Monadnock Region of Southwestern New Hampshire, there are 400 acres of rolling, heavily wooded hills, traversed by unpaved roads, that each year attract some of the country's most talented writers, painters, composers and film makers. For periods ranging from four to twelve weeks, each of these artists is assigned a studio equipped to meet his or her artistic needs, and located out of sight and sound of all other buildings. The place is called the MacDowell Colony, and was named for the composer Edward MacDowell who established the retreat on his property in 1907. The Colony's purpose is to provide a place where artists may find freedom to concentrate upon their work for long periods without distraction or intrusions. Those fortunate enough to obtain invitations, receive what is in every sense, a gift of time.

Reading the Supreme Court's opinions in the Columbus and Dayton school desegregation cases,[1] I was reminded of the MacDowell Colony and wondered whether in its own way the Court had not in those opinions offered to plaintiffs' and defendents' counsel, private and government civil rights agencies, indeed to all those whose policies determine the educational fate of thousands of minority children, something equivalent to what MacDowell offers artists: a gift of time.

The Court's gift is not a physical place, but an appropriate interval in time to reassess progress and problems while relating both to the present needs of poor, non-white children. This is a good opportunity to read and carefully examine all the Supreme Court opinions, both in these two most recent decisions and in those issued by the Court in the last several years. For a change, we must read and consider the cases not in an adversarial way, that is emphasizing the points that strengthen one's "side," while distinguishing or simply rejecting arguments for the "opposing" view. Rather, we should weigh all the positions taken, granting merit to those deserving merit without regard to whose brief they support.

I do not suggest that pending school desegregation litigation be stayed or delayed, nor is it realistic to urge that litigation participants find the legal equivalent of a MacDowell Colony for a joint retreat. A summit type conference would be difficult to arrange, harder to finance, and offer simply a different forum for adversarial encounters. Rather, in the wake of the two major school decisions decided just after the twenty-fifth anniversary of Brown, each litigation and policy maker might appropriately conduct a quiet, private review of where the school desegregation campaign is heading, and whether his or her role in that campaign remains productive and truly in the interests of those who have never known the educational benefits Brown offered to non-white children.

What I am urging, and what I shall attempt here is not a legal analysis of the decisions, but an appraisal of the national political and economic environment in which those decisions must be read and implemented. There is worth in such a process even if, when it is completed, a conclusion is reached that no change in direction is required. Thus, the reassessment may bring comfort to some as well as disquiet to others. In either event, the time devoted to the exercise should prove worthwhile, a gift that may clarify purpose and sharpen

insight in a struggle during which the noise and smoke of battle has too often obscured the field.

Many who read this publication regularly will respond to this suggestion with a reminder that school desegregation is the modern equivalent of the Holy Crusades, and that partisan unswerving commitment is not only appropriate, but absolutely required if the great vision of Martin Luther King is ever to be realized in our public schools. They will argue that those who resist the complete and immediate integration of the schools are racists, those who would accept half measures to improve the quality of black schools are quitters, and that both groups should be condemned for what they are. It will be said that those who fought to gain the Brown precedent have endured much, and all who truly believe in an integrated society must be ready to endure more before the victory is won. Any who disagree with these precepts must, by their disagreement, be deemed enemies, and, as such, be condemned or, at least, ignored.

It is appropriate that those who hold to this view of Brown as preeminently a school integration decision in which equal educational opportunity is a by-product that will occur spontaneously when schools are finally integrated, are not deterred by the fact that their position is a minority view. The majority of Americans are opposed to it, or more accurately opposed to those necessary changes in school system functioning that are required to bring it about. They avidly express their opposition at every opportunity: when school boards are elected, when anti-busing referenda are on the ballot, and when all else fails, by enrolling their children in private schools, or relocating themselves to the suburbs. Liberals refer to such avoidance by the uncomplimentary term, "white flight," but while condemned from every liberal pulpit and platform in the country, white flight seems to have lost none of its popularity.

It is fairly safe to say that most school boards in America will not voluntarily racially balance schools if non-whites constitute a substantial percentage, 35 percent or more, of the student population. This is particularly true in large, urban districts where non-white children are a majority in the schools but whites dominate the school board, and in mainly white suburban school systems. Few, if any, of these school boards are opposed to the basic holding in the Brown case. They do not argue that school boards should by law or policy segregate children or faculty in the school on the basis of race. Where, as in the Columbus and Dayton cases, policies of predecessor boards did cause segregation, the current boards condemn this action and maintain that they have taken all steps possible to eradicate its effects. They argue that current racial isolation in the schools is not brought about by school board policy, but is the result of housing segregation, income disparities between blacks and whites, and other socio-economic factors which the school board did not cause and cannot cure. Under the school board view of the law, it is educationally appropriate for the school systems to adopt voluntary transfer plans, establish magnet schools, and take other similar steps to ease segregation in their schools about which they are concerned, but over which they have no control and which, more importantly, they have no constitutional obligation to remedy.

These two disparate interpretations of Brown: (1) the school integration view espoused by civil rights groups who represent plaintiffs in school desegregation cases, and (2) the school board view adhered to by those who

are the defendants in these cases and reflect the position which is clearly the dominant view in the country, provide the major points of contention over which dozens of litigation battles have been fought over the last decade. If the results in Columbus and Dayton are any indication, then the final outcome of these battles is not difficult to predict. The integration view will prevail in the courts, and the school board view will prevail in the land.

Assume for the moment that integration proponents will always be able to produce evidence that the existing segregation is due, in substantial part, to board policies or actions that furthered the earnest desires of whites those boards represented to have their children attend schools that are mainly white rather than mainly black.

This is what the majority speaking through Justice White found in the Columbus and Dayton cases. Rejecting the Board's contentions that it had not operated a segregated school system "with any general or specific racially discriminatory purpose," Justice White agreed with the district court "that the Board's conduct at the time of trial and before not only was animated by an unconstitutional, segregative purpose, but also had current,segregative impact that was sufficiently systemwide to warrant (a systemwide) remedy...."[2]

When plaintiffs' counsel produce such proof, and through it establish school board liability, courts have little alternative, despite frequently voiced reservations, but to grant the relief requested: racial balancing of the schools. For example, in the Ohio cases, Chief Justice Burger, who wrote the majority opinion in the Swann[3] decision, deferred to the trier of the facts and concurred in Columbus, though for similar reasons he dissented in Dayton. He agreed though with Justice Powell, who dissented in both cases, that the use of massive transportation to effect a racial balance remedy was of doubtful wisdom. "It is becoming increasingly doubtful that massive public transportation really accomplishes the desirable objectives sought."[4] Even so, Justice Burger reluctantly acknowledged,"our prior decisions have sanctioned its use when a constitutional violation of sufficient magnitude has been found."[5]

When racial balance relief requiring busing is obtained in most systems, a phenomenon that has become a predictable paradox will usually occur. To the extent that racial balance orders are granted, to that extent white flight will render them difficult to attain and impossible to retain. And the Court in the Pasadena[6] case has made clear that when a desegregated system has become resegregated by changes in residential patterns not the result of further school board policy, a school board has no further legal duty to rebalance the schools.

There are few more poignant portraits than that of the federal judge who, having ordered full desegregation of a system with perhaps twenty-five percent non-white children, must rescind that order four or five years later because children are being bused from one mainly non-white school to another in a system that is now eighty to ninety percent non-white. It is not easy to imagine a better, modern example of the classic Pyrrhic victory.

Avoidance of what appears an inevitable disaster for those who see Browr as the only hope for providing effective educations to poor, non-white children, is less likely than it might be because school integration proponents view the events in the twenty-fifth anniversary of the Brown decision as a challenge rather than a warning. For example, the editors of Desegregation Update express

their concern at continuing resistance but with evident satisfaction note that historians will write of 1979 as the year "that the United States Supreme Court reaffirmed the legal principles of northern school desegregation in cases brought to them from Columbus and Dayton...."[7] It is correct that the clear setbacks in school desegregation that seemed to be impending following the first Supreme Court decision in the Dayton case,[8] were avoided, or perhaps more accurately postponed. But in the Columbus and Dayton decisions, only five justices were convinced that the school boards in each case were responsible for segregatory policies that justified systemwide relief. In the view of some, these decisions, coupled with the defeat of the Mottl Amendment, a resolution to amend the United States Constitution so as to prohibit school officials from compelling a child to attend a school other than the one nearest his/her home, "make systemwide desegregation more likely in most northern and western cities where litigation is pending."[9]

Such optimism is typical but hopelessly unrealistic. Four members of the Court, the Chief Justice, and Justices Powell, Stewart and Rehnquist dissented vigorously in the Dayton case and Chief Justice Burger and Justice Stewart wrote far from enthusiastic concurrences in the Columbus decision. It is clear that the schism that developed in the Court both on the issue of the proof required to establish school board liability, and the proper limitation of relief granted to correct proven harm, remains sufficiently unresolved that some future case with somewhat less compelling facts than Dayton or Columbus, could provide a majority for the Burger, Rehnquist, Powell, Stewart concerns. And, even if this does not occur, as indicated earlier, it is one thing to order the racial balancing of a school system, including busing, and it is another to get the white population to accept it. The continuing decrease in white, middle class students attending urban schools represents the unhappy evidence that school integration proponents are far better at the first task than the second. Indeed, in virtually every instance I know of, those who espouse racial balance remedies reside, fortuitously, in areas where their children will not be affected by school desegregation orders.

This is not said in criticism. The fact is that all parents want the best education for their children, and few will sacrifice their children's education for a political ideal, no matter how praiseworthy. This is a fact of life for poor parents as well as those in the middle class, and should be given far more attention than it generally receives. There are other such facts which are entitled to serious review and reflection during the period of reprieve provided by the cautionary victories in Columbus and Dayton:

(1) Very few school boards oppose voluntary transfers by students assigned to schools where their race is in a majority who wish to transfer to schools where their race is in the minority. Indeed, in many systems, such transfers are encouraged, and aided by the provision of transportation.[10] There are even instances where minority students are actively recruited for such programs.

The Supreme Court held over a decade ago that voluntary transfers or "freedom-of-choice" policies place the burden of school desegregation on minority children and thus are not usually adequate to fulfill a school board's responsibility under Brown.[11] At that time, when school desegregation efforts were centered in the South, it was assumed that freedom of choice plans were unworkable, not because black parents did not wish to obtain desegregated educations for their children, but because they feared economic retaliation and possible physical violence.[12]

Whatever the justification for the Court's concern about blacks facing school desegregation in the hostile South a decade ago, it is hardly likely that similar concerns explain the relatively small percentage of non-white families who today avail themselves of voluntary transfer policies in urban school districts.

Thus, while the inclusion of voluntary transfer provisions would seem an absolute moral as well as legal imperative in all contemporary school desegregation plans, school integration proponents should give far more attention than they do to the fact that mandatory reassignment plans may be as coercive and threatening for non-white parents as they are to whites. At the very least, more objective investigation than has been undertaken thus far should be conducted to determine why black parents, aware as they must be that the predominantly black schools to which their children have been assigned, are likely inferior as to plant, personnel, and resources, nevertheless fail to request that their children be given transfers to mainly white schools.

(2) A likely result of an investigation into why poor, Black, Chicano, and Hispanic parents want good schooling for their children but do not wish to send them far from home to obtain it, will be the rediscovery of what the Kerner Commission told us a decade and a half ago, that racism has created two societies directed along racial lines. For school desegregation purposes, the division should include class as well as race. Those non-white children in the middle class are the potential beneficiaries of school desegregation remedies, but if the process threatens educational plans their parents can (and often do) follow their white counterparts to the suburbs or to private schools. The poor have no such options, and today are fighting what for many is a losing fight for their economic survival. When whole communities are devastated with astronomical unemployment rates, inflation that causes the middle class to wince brings the poor to the brink of starvation.[13]

Non-white parents caught up in a crisis of survival are unlikely to have time or energy to involve themselves in their children's neighborhood schools. To expect that assignment of those children to potentially better schools across town will provide that time and energy is to expect more than experience indicates will occur. And there is no doubt that without parental involvement, educational progress is impossible for all but the most exceptional children.

To imagine that reassignment to an integrated school will automatically transform a child from the lower class into a child with middle class experience, outlook, and opportunity is to err as grievously as to presume that lower class inadequacies in blacks are attributable to genetics rather than societal deprivation.

My often expressed personal view is that we should focus what legal leverage exists to secure for these children educational programs that will meet needs that most of us who determine school litigation policy cannot easily imagine and can't begin to address. I may be wrong, but it is one view, and it pained me to read a statement by the Director of the National Project and Task Force on Desegregation Strategies who after decrying the fact that "once staunch advocates" of school desegregation were now urging the provision of effective education in minority schools, characterized those positions as a "retreat" which others must resist. And then, quoting Gary Orfield, he stated, "School desegregation may be merely a first bridge across the racial gulf, but it is a bridge which we can build in our generation."[14]

The goals are commendable and are generally shared, but can we reach them by

trying to traverse the chasms of race and class by bridging them with the bodies of poor, non-white children using policies that prove our commitment as they destroy their souls?

(3) School board members and state agency officials should consider that the devastation now being visited on poor, minority kids will not be limited to the ghettoes. The school litigation which some school boards seem to wage as a rear-guard holding action pending the escape of all middle class whites (and blacks) to the suburbs will, so Justice Powell has warned, undermine the very foundations of the public school system.

If integration proponents succeed, as they well may, in meeting the heavy proof standards required to obtain metropolitan-wide relief in a major area, then it is not hard to imagine a successor to the Mottl Amendment that will not be defeated by a close 216 to 209 vote. Then, motivated by the fear that the suburbs may no longer provide a mainly-white haven for the middle class, who will rest secure in the certainty that the Senate and two-thirds of the states will not approve an amendment barring the mandatory assignment of a child to a public school other than the one nearest his residence? And given that power, it is not hard to imagine Congress exercising far more control over the public schools than is now the case.

Even if no amendment is enacted, school systems cannot survive without the support, political and financial, of the middle class. Perhaps school officials have concluded that the public schools should not survive and that the renewed interest in funding schools through voucher systems is the educational wave of the future.[15] If so, they might spare the needless waste of resources by advocating directly this controversial reform.

The points discussed do not exhaust the possibilities for review by all sides involved in school desegregation litigation. It is clear from the opinions in Columbus and Dayton that members of the Court are concerned by the confusion and contradiction in their precedents, the growing public opposition to their decisions and the tendency of those decisions to result in more of the very racial segregation they were intended to end. We cannot expect that the slender majorities by which racial balance orders have been approved will continue indefinitely. When they go, school boards' and plaintiffs' counsel should have replacements ready.

While speaking to the Court, Justice Powell provided advice for us all when he wrote: "The time has come for a thoughtful reexamination of the proper limits of the role of courts in confronting the intractable problems of public education in our complex society."[16] Can there be any doubt that the longer we delay our reassessment, the sooner a majority of the Court is likely to accept Justice Powell's invitation?

FOOTNOTES

1. Columbus Board of Education v. Penick, 99 S. Ct. 2941 (1979) and Dayton Bd. of Education v. Brinkman, 99 S. Ct. 2971 (1979).

2. Columbus Board of Education v. Penick, 99 S. Ct. at 2945. The Court made similar findings in Dayton Bd. of Education v. Brinkman, 99 S. Ct. at 2979.

3. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

4. 99 S. Ct. at 2952.

5. Id.

6. Pasadena City Board of Education v, Spangler, 427 U.S. 424 (1976).

7. 22 Desegregation Update 4 (August 1979), published by the Citizens' Council for Ohio Schools, 517 The Arcade, Cleveland, Ohio 44114.

8. See e.g., Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977).

9. 22 Desegregation Update, note 7, supra at 4.

10. Justice Powell reminds in his dissent that Swann specifically authorized majority-to-minority transfer provisions "as a useful part of every desegregation plan." 99 S. Ct. at 2992.

11. Green v. County School Board of New Kent County, 391 U.S. 430 (1968).

12. 391 U.S. at 440 n.5.

13. See, generally, Hill, The Economic Status of Black Families, in the State of Black America 1979, at 26-27 (The National Urban League, J. William ed. 1979).

14. Williams, Ben, To Build a Better Bridge, in Progress, published by the National Project and Task Force on Desegregation Strategies, at 7 (Spring 1979).

15. See, e.g., J. Coons and S. Sugarman, Education by Choice: The Case for Family Control (1978).

16. 99 S. Ct. at 2992.

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